

DIVISION I

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
OLLY NEAL, Judge

CA06-15

August 30, 2006

SUSIE NOWLIN

APPELLANT

v.

WAL-MART STORES, INC.
CLAIMS MANAGEMENT, INC.
APPELLEES

AN APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[F403942]

AFFIRMED ON DIRECT APPEAL;
AFFIRMED ON CROSS-APPEAL

In this workers' compensation case, the parties bring this appeal and cross-appeal from an October 28, 2005, decision of the Arkansas Workers' Compensation Commission. In its October 28 decision, the Commission affirmed and adopted the administrative law judge's (ALJ) decision that found that appellant/cross-appellee Susie Nowlin proved by a preponderance of the evidence that she sustained a compensable injury to her right knee on March 23, 2004. However, the ALJ also found that Ms. Nowlin failed to prove that additional medical treatment after April 8, 2004, was reasonably necessary. The ALJ further found that Ms. Nowlin was in her healing period from March 23, 2004, through April 8, 2004, and that after April 8 she ceased being in her healing period.

On direct appeal, Ms. Nowlin argues that the Commission erred when it found that on April 8 she ceased being in her healing period and was no longer entitled to further medical treatment. On cross-appeal, appellee/cross-appellant Wal-Mart argues that the Commission erred when it found that Ms. Nowlin sustained a compensable knee injury on

March 23, 2004, and that she was entitled to medical and temporary-total disability benefits through April 8, 2004. We affirm the direct appeal and the cross-appeal.

The facts of this case are as follows. From August 2001 through May 2003, Ms. Nowlin worked for Wal-Mart in Monroe, Louisiana. In September 2003, she began working for Wal-Mart in El Dorado, Arkansas, as an inventory control systems grocer. This position involved stocking the shelves, “palletizing,” and moving pallets.

On March 23, 2004, Ms. Nowlin was helping unload a pallet when the pallet jack “pulled up over [her] right foot and immediately sponged [sic] [her] back to the floor.” As a result, she hit her head on the concrete floor and twisted her right leg, ankle, foot, and knee. Ms. Nowlin’s right leg was swollen from the ankle to the knee, and she was unable to walk. Because she lived in Louisiana, Ms. Nowlin did not seek medical treatment at a medical facility in Arkansas. Instead, she managed to drive home using her left leg. After arriving home, Ms. Nowlin sought treatment at the North Monroe Medical Center. There, her leg was x-rayed, and she was provided crutches. It was noted on the emergency-room note that Ms. Nowlin had a contusion to the right knee with some tenderness.

The following day, Ms. Nowlin saw Dr. Gregory Smart, Wal-Mart’s company doctor. During her visit with Dr. Smart, Ms. Nowlin complained of pain in her right ankle, foot, and knee. Dr. Smart diagnosed Ms. Nowlin as having a strain-type injury. He prescribed medication, bed rest, and limited activity.

Ms. Nowlin saw Dr. Smart again on March 26, 2004. She complained of muscle spasms in her ankle and lower leg and was unable to bend her knee. Dr. Smart ordered that Ms. Nowlin continue to use the crutches, prescribed a “right dynamic pull universal knee wrap,” and referred her to Dr. James Mulhollan.

Dr. Mulhollan ordered an MRI of Ms. Nowlin’s right knee. The MRI revealed

changes in the medial patellar retinaculum and adjacent soft tissue that were possibly a partial tear or due to postoperative change, marked thickening of the patellar tendon that was possibly due to postoperative change or chronic patellar tendonitis, a small effusion, and a small focal osteochondral lesion of the lateral femoral condyle. Following Ms. Nowlin's visit, Dr. Mulhollan wrote the following:

The patient was impossible to examine for several reasons. First of all, she weighed 220 lbs on a 5'6" frame. There was a long anterior scar on her left knee. Apparently, she had surgery on both knees repetitively because of a high speed motorcycle accident. I have no idea exactly what was done to the right knee. The knee was not especially swollen. She declined to bend it from a fully extended position.

We obtained a standing AP x-ray. It did not show significant joint space narrowing. We could not get her to bend her knee sufficiently enough for a skyline x-ray. We did place her in the MRI unit. A copy of that report is enclosed. I think most of the MRI findings relate to her previous surgery.

I am not able to establish any diagnosis besides the fact that she has an injured extremity, a contusion, a sprain or some sort of nonsurgical derangement.

I filled out a work slip, and you have received a copy of that. I think she should do very limited activity through the rest of this week and the early part of next week. She will even need crutches for a few days. I hope she does well enough to try her regular job on April 8. I commented that I would be here on that occasion to modify that if she proved unable to fulfill the recommendation.

Because she disliked Dr. Mulhollan, Ms. Nowlin did not seek further treatment with him. She continued to experience pain and swelling in her knee, so on April 8, 2004, she sought treatment at Union General in Farmerville, where she underwent another x-ray, received an injection, and was prescribed steroids. Around that same time, Ms. Nowlin declined an offer of light duty.

Ms. Nowlin was granted a change of physician from Dr. Mulhollan to Dr. D'Orsay Bryant III and on June 17, 2004, she had her first visit with Dr. Bryant. Dr. Bryant diagnosed Ms. Nowlin with having "right knee traumatic injury with patello femoral chondrosis with possible meniscal tear," right knee osteochondral lesion, and right ankle sprain. He replaced

Ms. Nowlin's brace and prescribed medication and physical therapy. Ms. Nowlin saw Dr. Bryant again on July 15, 2004. His physical examination of Ms. Nowlin revealed swelling of the ankle and knee. She had a range of motion of 0-90° in her right knee.

In response to a letter from Wal-Mart's attorney, Dr. Bryant wrote the following:

The patient did not have, on clinical examination, a frank effusion in the knee requiring aspiration. However, the patient did have soft tissue swelling in the knee in which the fluid is present in the soft tissues. Therefore, the knee was swollen but not to the point where it required needle aspiration.

....

There was no effusion. However, the soft tissue swelling that the patient had of the knee could definitely be related to the patient's work related injury.

....

The majority of the MRI findings are related to the patient's knee surgery, but the MRI is nonspecific for cartilaginous injuries. Also, meniscal tears can be missed by [the] MRI. The MRI is only a diagnostic tool, but it's not 100 percent accurate.

In this same letter, Dr. Bryant gave the following explanations for his diagnoses:

The knee traumatic injury with patello femoral chondrosis with possible meniscal tears:

- a. This impression is related to the acute work related accident. However, the patient did have degenerative changes in the knee, but the acute injury is superimposed upon the chronic knee injury.
- b. I do not believe that these findings are a result of Ms. Nowlin's prior knee injury and the 1994 surgery.
- c. Regarding the objective findings, I rely on the patient's history, the traumatic incident and the clinical findings on my office examination.
- d. The patient does have a frank osteochondral lesion in the knee and does have severe patellofemoral crepitus on clinical examination. That is not under the patient's voluntary control and that the patient's cartilaginous damage to the kneecap is severe.
- e. There is no question that the patient did have chronic changes in the knee as a result of the 1994 surgery which was an arthrotomy. However, it should be noted that this injury was 10 years ago, and the patient was working satisfactorily in a manual labor job on the loading dock at Wal-Mart. The patient had been working for a period of years prior to the work related accident which caused a significant inability to perform on the right knee.

The right knee osteochondral lesion:

- a. I cannot confirm that this impression is developmental or degenerative in nature.
- b. These findings are not a result of Ms. Nowlin's prior knee injury and the July 21, 1994 surgery.
- c. The specific objective finding upon which my opinion is based is that noted by the MRI. It did denote an osteochondral lesion in the lateral femoral condyle.
- d. It is my impression that the acute work related injury may have contributed to the symptomatology currently being experienced by the patient. The patient had persistent, severe knee pain since the acute injury, and she stated that she did not have this pain and was, in fact, working satisfactorily prior to the injury. This injury was apparently not caused by the patient's prior injury in 1994 because Dr. Giller did not see it and made no mention of it in his operative report, and Dr. Giller did have direct visualization of the entire knee. Therefore, if the acute injury is not the entire cause of the osteochondral lesion, the patient could have acute cartilage damage in the area from the injury, and certainly the patient has become symptomatic in that area because of the acute injury, where she was not symptomatic before.

On November 30, 2004, Dr. Bryant wrote the following in response to a letter from Ms. Nowlin's attorney:

The patient had been performing her work responsibilities which did involve bending, walking and standing at Wal-Mart and was asymptomatic prior to her work related injury. She did have preexisting injuries to the knee but had been working satisfactorily. If that is correct, instead of saying that "it is my impression that the acute work related injury may have contributed to the symptomatology currently being experienced by the patient," it should be worded that "it is my impression that the acute work related injury did result in the symptomatology currently being experienced by the patient." That opinion is based on the history provided that the patient's knee pain and symptoms began following her work related injury to the knee and that she had no symptomatology in the knee prior to being injured.

At the hearing before the ALJ, Ms. Nowlin testified that in 1987 and 1994, she underwent surgery on her right knee. She said that afterwards, up until the March 23 incident, she had no further problems with her knee and had no restrictions. She did not believe that her knee had healed. She believed that she still needed to be under the care of a doctor. She testified that, since her accident, her leg had gotten worse. Ms. Nowlin stated

that, in order to walk, she currently needed the assistance of a brace. She said that her knee continues to hurt and, as a result, she was beginning to experience problems with her hip. She stated that, because she feared being unable to do the work, she turned down the offer of light duty. Ms. Nowlin said that Dr. Bryant misunderstood her when he wrote that the pallet and jack rolled over her ankle and knee. She said that she told Dr. Bryant that she had twisted her knee. During her testimony, Ms. Nowlin denied telling a co-worker a few days before her accident that she was having problems with her knee. She said that, since June, she had helped some in her husband's business.

Angela Peneger, an assistant manager, testified that she saw Ms. Nowlin's injury. She said that the jack pallet ran over Ms. Nowlin's foot, causing her to fall and hit her head on the floor. She said that afterwards, Ms. Nowlin complained that her foot and head were hurting. Ms. Peneger testified that she did not see Ms. Nowlin's knee.

Wanda Bryant testified that, on March 23, she helped Ms. Nowlin unload the pallet. She said that she and the truck driver pushed the pallet while Ms. Nowlin pulled the pallet. She said that the pallet jack ran over Ms. Nowlin's foot causing her to fall and hit her head. Afterwards, Ms. Bryant observed that Ms. Nowlin's foot was red and "trying to swell." She recalled that two to three days before her accident, Ms. Nowlin complained about pain in her right knee and said that she had been experiencing trouble with her knee.

James Booth, co-manager of the store's general merchandise division, testified that Ms. Nowlin worked for him. He said that he learned of Ms. Nowlin's accident on March 24, after an associate informed him that Ms. Nowlin had been injured. He said that Ms. Nowlin declined his offer of light duty. Mr. Booth testified that, following her accident, he observed Ms. Nowlin standing outside her husband's business. He recalled that she was not wearing any type of brace and that she was smoking a cigarette. He said that occasionally Ms.

Nowlin would “reach and grab the door frame” so she could step up into the portable building being used to operate her husband’s business. Mr. Booth testified that he saw Ms. Nowlin two weeks later at Wal-Mart in Farmerville and that, this time, she was wearing a leg brace.

The ALJ found that Ms. Nowlin proved by a preponderance of the evidence that she suffered a compensable right knee injury on March 23, 2004. The ALJ also found that from March 23, 2004, through April 8, 2004, Ms. Nowlin remained in her healing period and Wal-Mart was responsible for medical benefits and temporary-total disability benefits during that time. However, the ALJ found that Ms. Nowlin failed to prove that she remained in her healing period after April 8 and, as a result, she was not entitled to further medical treatment. Both parties appealed the decision to the full Commission. The full Commission affirmed and adopted the decision of the ALJ.

In reviewing decisions from the Commission, this court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission’s findings and affirms the decision if it is supported by substantial evidence. *Clariday v. The Lily Co.*, ___ Ark. App. ___, ___ S.W.3d ___ (Apr. 19, 2006). Substantial evidence exists if reasonable minds could reach the same conclusion as the Commission. *Johnson v. Latex Constr. Co.*, ___ Ark. App. ___, ___ S.W.3d ___ (Mar. 15, 2006). The issue on appeal is not whether the appellate court might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission’s conclusion, the appellate court must affirm its decision. *Breakfield v. In & Out, Inc.*, 79 Ark. App. 402, 88 S.W.3d 861 (2002).

When the Commission affirms and adopts the ALJ’s opinion as the decision of the Commission, the Commission makes the ALJ’s findings and conclusions the findings and

conclusions of the Commission. *Fayetteville Sch. Dist. v. Kunzelman*, ___ Ark. App. ___, __ S.W.3d __ (Nov. 16, 2005). Therefore, in reviewing the case, we consider both the ALJ's decision and the Commission's majority opinion. *Id.*

Before being entitled to benefits, Ms. Nowlin had to prove by a preponderance of the evidence that she sustained a compensable injury. *See Wentz v. Serv. Master*, 75 Ark. App. 296, 57 S.W.3d 753 (2001). Therefore we begin by first addressing Wal-Mart's argument on cross-appeal, alleging that Ms. Nowlin failed to prove she sustained a compensable injury, because if we hold in favor of Wal-Mart all the remaining issues on cross-appeal and the issues on direct appeal become moot.

A compensable injury is defined as:

An accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence.

Ark. Code Ann. § 11-9-102(4)(A)(i) (Supp. 2005). A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D); *Crawford v. Single Source Transp.*, 87 Ark. App. 216, 189 S.W.3d 507 (2004); *Heritage Baptist Temple v. Robison*, 82 Ark. App. 460, 120 S.W.3d 150 (2003). Objective findings are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102 (16)(a)(i); *Heritage Baptist Temple, supra*; *Kimbrell v. Ark. Dep't of Health*, 66 Ark. App. 245, 989 S.W.2d 570 (1999).

Here, the testimony of Ms. Nowlin and her coworkers established that she sustained an injury arising out of and in the course of employment and that the injury was caused by a specific incident, identifiable by time and place of occurrence. The question is whether this evidence was supported by objective medical findings.

Of particular importance is the emergency room note made on March 23 following Ms. Nowlin's accident. A contusion was noted on her right knee, and the note also indicated that she had tenderness in the knee area. We have held that tenderness is not an objective finding because tenderness is measured by a patient's subjective reaction to stimuli and can be controlled by the patient. *Kimbrell, supra*. However, the existence of the contusion is sufficient proof that Ms. Nowlin sustained an injury to her right knee. Further objective findings include the swelling noted by Dr. Bryant and the changes in the knee revealed by the MRI. Viewing this evidence in a light most favorable to the Commission's findings, we cannot say that Ms. Nowlin failed to establish a compensable injury supported by objective medical findings. Therefore, she adequately proved that she sustained a compensable injury, and we affirm the Commission.

Because Ms. Nowlin proved she sustained a compensable injury, she was entitled to receive medical and temporary-total disability benefits. Temporary disability is that period within the healing period in which an employee suffers a total or partial incapacity to earn wages. *Death & Permanent Total Dis. v. Legacy Ins.*, ___ Ark. App. ___, ___ S.W.3d ___ (May 10, 2006). The healing period is defined as that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. *Breakfield, supra*. The healing period ends when the employee is as far restored as the permanent nature of his injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. *Johnson, supra*. Conversely, the healing period has not ended so long as treatment is administered for the healing and alleviation of the condition. *Breakfield, supra*. The determination of when the healing period has ended is a factual determination for the Commission and will be affirmed on appeal if supported by

substantial evidence. *Johnson, supra*. These are matters of weight and credibility and thus lie within the exclusive province of the Commission. *Id.*

Furthermore, Arkansas Code Annotated section 11-9-508 (Repl. 2002) provides that “the employer shall promptly provide for an injured employee such medical, surgical, hospital, chiropractic, optometric, podiatric, and nursing services and medicine . . . as may be reasonably necessary in connection with the injury received by the employee.” What constitutes reasonably necessary treatment under the statute is a question of fact for the Commission. *Hamilton v. Gregory Trucking*, ___ Ark. App. ___, ___ S.W.3d ___ (Nov. 16, 2005).

On direct appeal, Ms. Nowlin argues that the Commission erred when it found that her healing period ended on April 8, 2004. She also argues that she proved her entitlement and need for additional medical treatment after April 8, 2004.

In finding that after April 8, 2004, Ms. Nowlin ceased being in her healing period and was no longer entitled to further medical treatment, the ALJ wrote:

I find it significant that the notes from the claimant’s visit to the emergency room on April 8 reflect no knee complaints. The ER physician marked the claimant’s chief complaint as her right ankle and made no notation of pain or complaints in the knee. He specifically noted that his inspection of the knee was normal, that the claimant had normal range of motion in the knee, and that her knee was non-tender. The ER nurse did mention the knee, but I understood her notation to mean that the claimant’s lower leg was red and painful from the ankle to the knee, not that the claimant was having pain specifically in the knee itself. Finally, I note that when the claimant saw Dr. Bryant in June, several months after her compensable injury, he noted creitus, catching, and locking in the knee – none of which were noted by any prior physician.

Given these facts, I must find that the claimant has failed to prove by a preponderance of the evidence that additional medical treatment after April 8, 2004, was reasonably necessary in connection with the compensable injury.

Because Ms. Nowlin was not able to prove that further medical treatment after April 8 was reasonably necessary, the ALJ concluded that her healing period ended on that date.

Viewing this evidence in a light most favorable to the Commission, we agree with the

Commission's finding that Ms. Nowlin's healing period ended on April 8 and affirm the Commission's decision finding that, after April 8, Ms. Nowlin was not entitled to further benefits.

Affirmed.

HART and VAUGHT, JJ., agree.